IN THE

SUPREME COURT

OF THE

UNITED STATES.

No. 293.

WILLIAM NEWTON MEEKS,

Plaintiff in Error.

VS.

ROBERT OLPHERTS, et al.

Defendants in Error.

BRIEF OF S. M. WILSON,

Counsel for Defendants in Error.

IN THE

Supreme Court of the United States.

WILLIAM NEWTON MEEKS,

Plaintiff in Error,

vs.

ROBERT OLPHERTS, ET AL.,

Defendants in Error.

No. 293.

Brief on Behalf of the Defendants in Error.

This is an action of ejectment, commenced on the 30th September, 1872, in the Circuit Court of the United States for the District of California, to recover a lot of land in a central portion of the City of San Francisco, and being one hundred Spanish varas, or two hundred and seventy-five feet square, and of great value. The plaintiff is a resident and citizen of New York, and the defendants are citizens of California. A jury trial was duly waived and the issues were tried before the Court. The Court found in favor of the defendants, and the facts are set forth in the record very fully. They appear at folios 216 *et seq.* of the record, and dispose of all the issues raised by the answers. The questions on the writ of error all arise on the facts found by the Circuit Court.

The lot in controversy is situated within the corporate limits of the old city of San Francisco, as defined in Section 2 of "An Act to reincorporate the City of San Francisco," passed April 15, 1851. (See Session Laws of California for 1851, p. 357, ch. 84, and fols. 216, 217 Record.)

The city, as the successor of the ancient Mexican pueblo of Yerba Buena, claimed a tract of land embracing the lot in controversy, and presented its claim therefor to the United States Land Commission, organized under the Act of Congress of March 3d, 1851, but subsequently, and pending the claim, passed an ordinance granting the lots within the corporate limits referred to above, to the holders of grants from Alcaldes, and where there were no such grants then to *bona fide* possessors at times in the ordinance named. This ordinance has at San Francisco been usually called the Van Ness Ordinance, after its author, the Hon. James Van Ness, formerly Mayor of San Francisco. It was subsequently ratified by an Act of the Legislature of California, entitled "An Act concerning the City of San Francisco, and to ratify and confirm certain ordinances of the Common Council of said city," approved March 11, 1858 (Stats. of Cal., 1858, p. 52). This ordinance and Act of the Legislature are referred to in the Act of Congress, approved July 1st, 1864, entitled "An Act to expedite the settlement of titles to land in the State of California." (13 U. S. Stat. at L. 333, Sec. 5.) The 5th Section which is alone important in this case, is as follows:

"Sec. 5. *And be it further enacted*, That all the right and title of the United States to the lands within the corporate limits of the City of San Francisco, as defined in the Act incorporating said city, passed by the Legislature of the State of California, on the fifteenth day of April, one thousand eight hundred and fifty-one, are hereby relinquished and granted to the said city and its successors for the uses and purposes specified in the ordinances of said city, ratified by an Act of the Legislature of the said State, approved on the eleventh of March, eighteen hundred and fifty-eight, entitled 'An Act concerning the City of San Francisco, and to ratify and confirm certain ordinances of the Common Council of said city,' there being excepted from this relinquishment and grant all sites or other parcels of lands which have been, or now are, occupied by the United States for military, naval, or other public uses, or such other sites or parcels as may hereafter be designated by the President of the United States, within one year after the rendition to the General Land Office, by the Sur-

veyor General, of an approved plat of the exterior limits of San Francisco, as recognized in this section, in connection with the lines of the public surveys: *And provided*, That the relinquishment and grant by this Act shall in no manner interfere with or prejudice any *bona fide* claims of others, whether asserted adversely under rights derived from Spain, Mexico, or the laws of the United States, nor preclude a judicial examination and adjustment thereof."

The important section of the Van Ness Ordinance which is set out at length in the Act of the Legislature of March 11, 1858, confirming it (Stats. of Cal'a. 1858, p. 52), is Section 2, and by it the holders of Alcalde grants get the benefit of the Act of Congress and take title under it.

The lot in controversy here was found by the Court to be within none of the exceptions or reservations specified in the Act of Congress. (Fol. 219, Record.)

An Alcalde grant was made of the lot in controversy on the 14th January, 1847, to one Dunleavy.

On June 2, 1847, Dunleavy conveyed to one George Harlan, who died intestate on the 8th July, 1850, in possession of the lot, and in his lifetime he never conveyed it. He left surviving him a widow, six children, and two grandchildren, issue of a deceased daughter. (Fols. 217 to 221, Record.)

One of these children, George Harlan, came of age within three years next before the commencement of this action. One grandchild came of age prior to July 8th, 1866, and the other prior to July 8th, 1869. The other heirs were of age at the time of the death of the ancestor George Harlan. (Fols. Id.)

The widow, the children, and grandchildren all conveyed to the plaintiff in error, who commenced suit on the 30th September, 1872. (Fols. 221–2, also fol. 5, Record.)

In the meantime, however, administration was taken out upon the estate of George Harlan, and letters of administration issued, on the 19th August, 1850, to one Henry Smith, who qualified and entered on his duties. (Fol. 222.)

On 31st December, 1853, Smith resigned, and the Probate Court discharged him, and turned the estate over to the Public Administrator. (Fols. 223–4.)

On 15th June, 1855, Benjamin Aspinwall was appointed

administrator *de bonis non*, and qualified and acted until the 12th May, 1864, at which time letters were issued to Joel Harlan, one of the sons of the deceased, and to Lucien B. Huff, the husband of another heir, and they qualified and were acting at the time of the commencement of this action; the estate not yet having been closed. (Fol. 224, also 234.)

During Aspinwall's administration, he petitioned the Probate Court for an order of sale of the lot in controversy, to pay the debts of the deceased, and an order to that effect was granted on the 10th November, 1855. Pursuant to that order, the administrator sold the property in subdivisions, and the purchasers received conveyances on the 13th February, 1856, and they and their grantees, the present defendants, have ever since been in the actual, open, notorious, and exclusive adverse possession, claiming the same in their own right. (Fols. 232, 233, Record.)

The plaintiff in error contends that the order of sale of the Probate Court was null and void, because of irregularities in the proceedings, and that the purchasers obtained no title. It has, indeed, been so decided.

See *Haynes* vs. *Meeks*, 20 Cal. R., 288.

But the defendants plead the general statute of limitations of *five years*. (Stat. of Cal., 1850, p. 343; Hitt. General Laws of Cal., Arts. 4348–4349; Code of Civ. Pro. of Cal., Secs. 318–319, *et seq.*) And, also, the special statute of limitations of *three years*, contained in the Probate Act of Cal. relating to administrators' sales.

The general statute of limitations, in existence before the recent codes, has been continued in the Code of Civil Procedure, and is as follows:

"Sec. 318. No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor was seized or possessed of the property in question within five years before the commencement of the action."

"Sec. 319. No cause of action, or defense to an action, arising out of the title to real property, or to rents or profits out of the same, can be effectual unless it appear that the

person prosecuting the action or making the defense, or under whose title the action is prosecuted or the defense is made, or the ancestor, predecessor, or grantor of such person was seized or possessed of the premises in question within five years before the commencement of the act in respect to which such action is prosecuted or defense made."

There is, of course, the usual saving of the rights of infants, married women, insane persons, and persons suffering imprisonment, until five years after the removal of the disability.

The special statute of limitations of three years, contained in the Probate Act of Cal., is as follows :

"Sec. 190. No action for the recovery of any estate sold by an executor or administrator, under the provisions of this chapter, shall be maintained by any heir or other person claiming under the deceased testator or intestate, unless it be commenced within three years next after the sale."

"Sec. 191. The preceding section shall not apply to minors or others, under any legal disability to sue at the time when the right of action shall first accrue ; but all such persons may commence such action at any time within three years after the removal of the disability."

Hitt. Genl. Laws Cal., Arts. 5888–5889.
Stats. of Cal. 1850, p. 393, Sec. 191-192. Stats. of Cal., 1851, p. 472, Code Civ. Pro., of Cal. Secs. 1573–4.

QUESTION INVOLVED.

The question, therefore, presented by the record, is this : Assuming title to be shown *prima facie* in plaintiff, as derived from the heirs of Geo. Harlan, deceased, irrespective of the sale by the administrator to the grantors of the defendants, is the action barred either by the general statute or by the special statute of limitations contained in the Probate Act of California ?

I.

The title passed out of the United States on the 1st of July, 1864, under the Act of Congress of that date, and no survey, or patent was necessary for the consummation of the title. The Statute of limitation began to run from that date.

Palmer vs. *Low*, 98 U. S. R. 16.
Henshaw vs. *Bissell*, 18 Wall. 255.
Gardener vs. *Miller*, 47 Cal. 576.
Ryan vs. *Carter*, 93 U. S. 78.
Morrow vs. *Whitney*, 95 Id. 551.

II.

"Adverse possession for the requisite length of time transfers a title to the possessor which may be asserted affirmatively against, an otherwise valid record title."

Arrington vs. *Liscom*, 34 Cal. 366.
Palmer vs. *Low*, 98 U. S. R. 17.
Cannon vs. *Stockman*, 36 Cal. 541.
Leffingwell vs. *Warren*, 2 Black 605.

III.

The system of probate and the laws regulating the estates of deceased persons that prevail in California, differ much from the common law, and in order to fully appreciate the force of the statutes of limitations in this case, some reference to these differences must be made.

At common law the personal property passed to the administrator, and the realty to the heir. The administrator had nothing to do with the real estate; it never came under his charge. When the personal property was exhausted or fully administered, a creditor brought his action against the heir, who was responsible to the extent of the real assets descended; but even then, only upon certain debts of his ancestor, such as bonds, covenants, and other specialties, where the ancestor undertook to bind his heirs. On simple contract debts the heir was not bound at all, except by

statutes passed at a later period. The two branches of the estate were different, essentially. The administrator was a stranger to the heir, and the heir a stranger to the administrator. There was no privity between them as to the realty. A judgment against an administrator did not bind the heir. A judgment against an administrator reached the assets in *his* hands, and there stopped. A judgment against the heir stopped likewise with the exhaustion of the assets descended to him. It made no difference that the heir had disposed of the assets descended: the judgment was personal against him to the amount of the assets descended, if the creditor's claim was so large. Under this system, the reason why a judgment against the administrator was no evidence against the heir is most manifest. There were no sales of realty under order of Probate, Orphans, or Surrogate Courts, though Chancery sometimes entertained creditors' bills and marshaled the assets.

Williams on Ex., p. 1436-1463.

The statutory right, in most of the United States, of executors and administrators to petition Surrogate or Probate Courts to sell real estate, to pay debts, etc., does not change the relation of the administrator to the heir. The property descends as at common law, the personalty vesting absolutely in the administrator, and the realty in the heir. The order of the Probate Court authorizing a sale by the administrator does not interfere with the right of possession of the heir, nor his sole right to represent the realty, until called upon by a purchaser at Probate sale to deliver possession to him.

But in California no heir can be sued for the debt of his ancestor, no matter what estate or assets may have descended. The creditor must cause administration to be taken out, and present his claim to the executor or administrator and the Probate Judge and have it allowed, or recover judgment to be paid in due course of administration.

See *Arthur et al.* vs. *Cochran Tutor*, etc., 12 Rob. (La.) R. 41.
Harwood vs. *Marye*, 8 Cal. R. 580.
Beckett vs. *Selover*, 7 Ib. 239.

In other respects the system in California differs greatly from the common law system—is borrowed from Texas and Louisiana,—and more nearly assimilates to the civil law. We have here the *gananciales*, or common property system, and other peculiarities unknown to the common law. Here both the real and personal property passes in succession to the possession of the administrator, to be by him managed. He has equal power over each, there being a mere priority of sale as between personalty and realty. But he can sell neither, except on order of the Probate Court on petition duly filed. He must account for both alike. The heir can touch neither until it passes in succession to him on distribution, except in the case of a homestead, which never really go into administration, but is an exception, and specially preserved to the family, *as a family* rather than as heirs.

The distinction between our system and the common law is in many other respects very marked. In England the Ecclesiastical Court only had jurisdiction of the *personalty*, and so far only its decisions bound. It had no jurisdiction as to realty. A probate of a will in the Ecclesiastical Court had no effect as to the *realty*, but in every contest with the heir, the will had to be established by new proof where the realty was concerned. There can be no doubt that under our system the probate of a will binds the realty as well as the personalty in all collateral matters, as well as where the question is immediately involved.

See *Case of Wells' Will*, 5 Littell R. p 274.
Thompkins vs. *Thompkins*, 1 Story C. C. R. 552.
Spencer vs. *Spencer*, 1 Gal. 623.
Case of Broderick's Will, 21 Wall. 504
State of Cal. vs. *McGlynn*, 20 Cal. 234.

By the following sections of the statutes, the powers, duties, and office of the executor or administrator, and his relation to the heirs or devisees and creditors, is shown. (Secs. 114 to 205, Stat. of Cal. 1851, p. 461, Hitt. Genl. Laws of Cal., Arts. 5812, *et seq.*)

"Sec. 114. The executor or administrator shall have the right to the possession of all the real as well as the personal estate of the deceased, and may receive the rents

and profits of the real estate, until the estate shall be settled, or until delivered over by the order of the Probate Court to the heirs or devisees, and shall keep in good tenantable repair all houses, buildings, and fixtures thereon which are under his control."

By Section 194 of the Probate Act of Cal. the administrator is again required to "take into his possession all the estate of the deceased, real and personal," etc.

By Section 195 it is provided as follows :

"*Actions for the recovery of any property, real or personal, or for the possession thereof*, and all actions founded upon contracts, may be maintained *by and against executors ana administrators*, in all cases in which the same might have been maintained by or against their respective testators or intestates."

Sections 196 and 197 provide for all other actions by and against executors and administrators.

Section 198 gives an action to the administrator against the surviving partner of the deceased.

Section 199 gives the administrator an action on the bond of a former administrator or executor.

Section 202 allows the administrator even to file a bill to set aside a conveyance of his own intestate as fraudulent against creditors.

By Section 205, what is substantially a bill for the specific performance of a contract for the conveyance of land by the intestate, is provided for against the administrator; and upon a decree in favor of the petitioner, it is the administrator, and not the heir, who makes the conveyance.

In all this great system, which affects, every few years, all the land of the State, not a word is said in regard to the heir, except as the recipient of the residue, after the duties of the administrator have ended.

Here the administrator represents both realty and personalty, as he does in many States.

In Pennsylvania, where the real and personal property are both a fund in the hands of the administrator for the payment of the debts of the deceased, it has been held that he represents both realty and personalty, and that the real estate may be sold on a judgment against the administrator.

See *Graff* vs. *Smith*, 1 Dall., 483.
Wilson vs. *Watson*, 1 Peters' C. C. R., 269–272–3.
Morris vs. *Smith*, 1 Yeates, 243.
Young vs. *Taylor*, 2 Binn., 218.
Commonwealth vs. *Rahm et al.*, 2 Serg. & R., 377.

So in South Carolina.

See *Martin* vs. *Latta*, 4 M. Cord R., 128.
Spencer vs. *Godfrey, admr., et al.*, 1 Bailey, Eq. R., 469; Ch. Dessaussure.

So also in Louisiana.

Randall's Heirs vs. *Baldwin*, 4 Martin R., 456.

This was the law in Missouri until recently.

Carson et al. vs. *Walker*, 16 Mo. R., 81.

So in Massachusetts.

Gore vs. *Brazier*, 3 Mass. R., 523.

This was the civil law.

See Pothier on Obl., No. 52.

We have seen by the Probate Act that actions of ejectment may be brought by and against executors and administrators. The Civil Practice Act (Stat. 1851, p. 52) is in perfect harmony with this, and provides as follows:

Sec. 6. "An executor, or administrator, or trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him, the person or persons for whose benefit the action is prosecuted."

Now, for whose benefit does an executor or administrator sue? Clearly, heirs as well as creditors. Of a solvent estate, or where there are no debts, the suit would manifestly be for the benefit of the heirs.

"In all suits for the benefit of the estate, he represents both the creditors and the heirs," etc.

Beckett vs. *Selover*, 7 Cal. R., 239.
Cunningham vs. *Ashley*, 45 Cal., 493.
Tyler vs. *Houghton*, 25 id., 29.
Tynan vs. *Walker*, 35 id., 637.
No. 49–50 Eq. Rules U. S. Cts.
Mead vs. *Mitchell*, 5 Abb. Pr. R. 106. Affirmed 17 N. Y. 212.
Calvert on Parties 20.

"By our statute, 'regulating the settlement of estates,' all property of the deceased, both real and personal, goes into the possession of the administrator. The administrator, being entitled to the possession of the real property, must be a party to all suits affecting it."

Harwood vs. *Marye et al.*, 8 Cal. R., 580.

The administrator, and not the heir, is the proper party to bring ejectment.

Curtis vs. *Herrick*, 14 Cal. R., 119.

The administrator is the proper party to bring an action to quiet the title of the property of the deceased of which he has possession. Such a suit is "prosecuted for the benefit of the estate."

Curtis vs. *Sutter*, 15 Cal., 264.

Now, however, by an amendment of the statute, the heir may bring a suit also to quiet title, the administrator's possession being deemed the possession of the heir for that purpose.

Probate Act of Cal., Sec. 194, as amended.

The executor or administrator has an express statutory right to sue in matters effecting the property of the testator or intestate.

Halleck vs. *Mixer*, 16 Cal., 579–80.

Where a United States Patent, issued to Teschemacher and Howard, as executors, and Agnes Howard, executrix, of W. D. M. Howard, deceased, and the executrix subse-

quently married, it was held that her powers in the matter ceased, and that an action of ejectment was rightly brought at a subsequent time, in the name of the two executors. This is a very strong case, for the patent ran to her by name, as executrix, as one of the grantees. Yet when her office ceased, her powers ceased.

Teschmacher vs. *Thompson,* 18 Cal. R., 20.

But probably a stronger case is that of *Meeks* vs. *Hahn* (20 Cal., 620), being a suit by this plaintiff in error for the same property involved here. There it was held not only that the right of action in ejectment is in the administrator, but that it is exclusively in him, and that the heir cannot sue until the administration has been settled, or the property been distributed to the heirs by a decree of the Probate Court.

To the same effect is *Meeks* vs. *Kirby*, 47 Cal., 169 (brought by this same plaintiff for this same property), and also *Chapman* vs. *Hollister*, 42 id., 463; *Burton* vs. *Lies,* 21 id., 91.

IV.

Under this system results follow which never ensued at common law; in fact could not arise under the common law system.

A judgment against an administrator or executor in reference to the property of the estate, is a bar to a subsequent action by the heir or devisee, and this too even in an action of ejectment or other suit to recover lands. It is the title of the ancestor that is tried.

Cunningham vs. *Ashley*, 45 Cal. 485.

This result follows logically from a system in which the administrator or executor is entitled to the exclusive possession during administration, which may last through many years, and is alone authorized to maintain actions to recover the property of the estate.

Cunningham vs. *Ashley, (supra.)*

Add to this the additional fact that when the administrator sues, he represents the heirs as well as the creditors,

and it necessarily follows that when the administrator is barred of his action the heir is barred. The bar is good against the heir, even though laboring under a disability.

Darnell vs. *Adams*, 13 B. Mon. 278–9.
Couch's Heirs vs. *Couch's Adm.*, 9 Id. 162.
Rosson vs. *Anderson*, Id. 425.

The Practice Act of California puts an executor, administrator, and trustee of an express trust, all on an equality, giving each the right to sue without joining the "person or persons for whose benefit the action is prosecuted."

Civil Pr. Act, Sec. 6. Stat. of Cal. 1851, p. 52.

This section of the Practice Act is very similar to Rules 49 and 50 of the Equity Rules of the Federal Courts.

See Law's U. S. Courts, Jur. and Pr. 469.

There trustees concerning real estate are declared to "represent the persons beneficially interested in the estate or proceeds, or the rents and profits, in the same manner and to the same extent as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; in such cases it shall not be necessary to make such persons beneficially interested in such real estate, or rents and profits, parties to the suit," etc.

The English Orders in Chancery are substantially the same.

See Ib. appx. 603, *et seq.*
See also Story Eq. Pl. 172, and note.

In California the personalty and realty occupy the same position in the hands of the administrator, therefore his relation to the heir in respect to the land is the same as in regard to personalty, and as to both it is exactly like that of the trustee to the *cestui qui trust.*

Now when a trustee is barred by the Statute of Limitations, the *cestui qui trust* is likewise barred, even though an infant.

Hill on Trustees, 267–403–504.
Williams vs. *Otey*, 8 Humph. 563.

Wooldridge vs. *Planters' Bank*, 1 Sneed, 297.
Worthy vs. *Johnson*, 10 Geo. 358.
Long vs. *Cason*, 4 Rich. Eq. 60.
Tiffany & Bull. on Tr. 720.
Hovenden vs. *Lord Annesley*, 2 Sch. & Lef. 628.
Pentland vs. *Stokes*, 2 Ball & B. 74.
Lyon vs. *Marclay*, 1 Watts, 275.
Needlecott vs. *O'Donnell*, 2 Ball & B. 67–156.
Wych vs. *East India Co.*, 3 Pr. Wms. 309.

In *Smilie* vs. *Biffle*, (2 Barr, Pa. R. 52) it is said: "An opinion was formerly pretty generally entertained that trust estates were not within the Statute of Limitations. But in *Llewellen* vs. *Mackwourth*, Lord Hardwicke observes: The rule in a Court of Equity that the Statute of Limitations does not bar a trust estate, holds only as between *cestui qui trust* and trustee; not between *cestui qui trust* and trustee on the one side and a stranger on the other, for that would be to make the statute of no force at all, because there is hardly an estate in the kingdom without such trust, and so the act will never take place. Therefore, where *cestui qui trust* and trustee are both out of possession, for the time limited the party in possession has a good bar against both. (15 Vin. 125, pl. 1; 1 Saunders' Uses and Trusts, 280; 1 Cox, 28; Blanchard on Limitations, 38.) Indeed, the wonder is that so plain a proposition should ever have been doubted. * * * The act commenced running the instant the purchaser took possession. * * * When the act commences running, it continues to run, as is well settled."

We thus are enabled to see the dependence of the heir upon the administrator under our law, whilst at common law he was entirely independent, as we have above shown.

If the heir were not barred when the administrator is, then we have the strange result, that as long as the administration lasts, the disseisor holds the property. The administrator can not get it; creditors can not reach it, for they can only pursue the administrator; it can not be distributed to the heir, because the administrator can not administer upon it; yet the heir can not recover it pending administration. The administration may last, as it has in some instances, very many years; or as in this very Harlan estate, now pending since the year 1850. (Fols. 222-244.)

The Statute of Limitations commenced to run 1st July, 1864, the date at which the title under the Act of Congress passed out of the United States. At that time the defendants or their grantors were in possession, under the sale made pursuant to the order of the Probate Court, which was consummated by conveyances made on the 13th February, 1856, and thenceforth have held adversely, upwards of *sixteen years* before this suit was brought, and for eight years after the title passed out of the United States by the Act of Congress of 1st July, 1864. During all these years administration was pending, and the administrator could have maintained his action to recover the property within the three years after July 1, 1864.

In construing the statute of 21 James I, ch. 16, the English Courts have held that the term "cause of action" implies as well a right of action as the existence of a person capable of bringing the action; and so, if the time has not commenced to run, it does not commence until administration granted. This rule has also been followed in some of the United States. But the Supreme Court of California, in *Tynan* vs. *Walker*, 35 Cal., 637, have held, and it is now the law of that State, that the Statute of Limitations runs in favor of an adverse possessor of land, though there be no person in existence competent to sue.

It will thus be seen that the heir or devisee is dependent upon the diligence of the administrator or executor, but he is not without a remedy, in case of neglect. He may bring his action against the administrator or executor for damages, or sue on his bond, or by proper proceeding compel him to bring suit.

Smilie vs. *Biffle*, 2 Barr. 52–4
Tyler vs. *Houghton*, 25 Cal. 29.

So, too, the heirs or devisees could have made complaint to the Probate Court, that the administrator had neglected his duty, and that Court would summarily have suspended the administrator until the matter could have been investigated, and in the meantime a special administrator would have been appointed, with power to bring suit.

The Statute of California of 1861 (Stat. 1861, pp. 651–652) is as follows:

"SEC. 281. Whenever the Probate Judge has reason to believe from his own knowledge or from credible information, that any executor or administrator has wasted, embezzled or mismanaged, or is about to waste, or embezzle the property of the estate committed to his charge, or has committed or is about to commit a fraud upon the estate, or has been incompetent to act, or has permanently removed from the State, or has wrongfully neglected to perform any act as such executor or administrator, it shall be his duty, by an order entered upon the minutes of the Court to suspend the powers of such executor or administrator until the matter can be investigated."

"SEC. 282. During the suspension of the powers of the executor or administrator under the authority of the preceding section, the Probate Court or Judge may, if the condition of the estate requires it, appoint a special administrator to take charge of the effects of the estate, who shall give bond, and account as other special administrators are required to do."

These sections have been adopted into the present Civil Code of California—Sections 1436–1411.

But the administrators above referred to, Harlan and Huff, after their appointment, in May, 1864, brought suit in one of the State Courts of California to recover property belonging to their intestate which had been sold under an order of the Probate Court by one of their predecessors—Smith,—made on August 13th, 1853. The defendant claimed under that sale, which was held void for irregularities in the proceedings, and pleaded the special statute of limitations contained in the Probate Act, being Section 190 above referred to. Several of the heirs of Harlan intervened and claimed against both plaintiffs and the defendant. The case was decided at the October Term, 1867, of the Supreme Court, and is reported under the name of *Harlan* vs. *Peck*, 33 Cal. 515. The question was squarely put, as to whether that section applied to sales under order of the

Probate Court which were void, or only to those voidable. The Court held that "there is nothing in the policy or language of the statute, which excludes void sales from its operation. The policy of the statute is to quiet title to real estate sold by order of the Probate Courts, and in view of that policy, merely, there can be no distinction between sales which may be termed void for the want of jurisdiction and those which are voidable only. Nor is there anything in the language of the statute which creates such a distinction. * * * We think the statute applies to all sales void as well as voidable, made by Probate Courts, of real estate belonging to persons who have died since the passage of the Probate Act."

The sections of the Probate Act referred to were first enacted April 22, 1850, (Stat. of Cal. 1850, pp. 377–393) and have ever since remained the law of the State. Harlan, under whom plaintiff claims, died on the 18th August, 1850.

(Fol. 222, Record.)

A petition for rehearing was filed in the Supreme Court, in the case last referred to and was, at the March Term, 1868, denied, and at the same term the case was again affirmed in the case of *Harlan* vs. *Miller*, a certified copy of which will be filed with this brief, the case not being published by the Reporter, except in Index to the 34 Cal., 702. (See also *Meeks* vs. *Vassault*, 3 Sawyer, R. 211.)

This may therefore be considered as the settled law of the State, and as in *Harlan* vs. *Peck, (supra)* the heirs intervened and became parties to the action, the decision must be considered as decisive of the case at bar.

V.

But it was urged in the Court below, and doubtless will be here, that the heirs could not, under the law of California, bring an action until distribution, and that they were therefore under a disability, such as is referred to in Section 191 of the Probate Act, and that this action was commenced within three years after distribution, which was the removal of the disability. The answer is very tersely put, in the able opinion of the Hon. Circuit Judge, in the Court

below. (*Meeks* vs. *Vassault*, 3 Sawyer, R. 213-214.) "The disability mentioned, is undoubtedly one of the disabilities, already existing, recognized by the statute of limitations, affecting the capacity to sue of a person having a present right of action, existing in himself and which excuses him from bringing the action. It cannot mean the want of a present cause of action. If there is no present right of action in a party, he has no occasion for a present capacity, an ability to sue, or, for an excuse for not suing."

The statute of limitations is a statute of repose, (Ang. on Lim. p. 20), and is based on the idea of an existing right of action too long protracted. The disabilities are excuses for the delay. The language of all statutes of limitations expresses that idea. The 21 James I., Ch. 16, provides (Sec. 7), that if any person *entitled to bring any of the personal actions* therein mentioned, shall be at the time the cause of action accrued, within the age of twenty-one years, etc., such person shall be at liberty to bring the same actions within the times limited by statute, after his disability has terminated.

The statute of California is to the same effect.

"Sec. 352. If a person *entitled to bring an action* mentioned in chapter three of this title, be at the time the cause of action accrued, either—

1. Within the age of minority, or [reciting the other disabilities of insanity, imprisonment, and coverture.]

The time of such disability is not a part of the time limited for the commencement of the action."

Sec. 352, *Code of Civ. Pro.*

In California, it has been held that there can be no exceptions other than those expressed—no implied exception or exceptions based upon the idea that they are within the equity of the statute.

Tynan vs. *Walker*, 35 Cal. 643.
See also *McIver* vs. *Ragan*, 2 Wheat. 28.

"The statute has never been so construed as to prevent a person laboring under a disablility from suing at any time during the disability."

Ang. on Lim., Sec. 195, p. 195.

The statute contemplates in this regard two things: 1st, a person having a present right of action which he may immediately enforce; and 2nd, a condition of that person, called a disability, excusing him during its existence from acting. The disability must exist when the cause of action first accrues; unless it does, the disability is no excuse, for when the statute commences to run it continues to run.

To say that the right of action "first accrues" when the disability is removed, is to confound things utterly dissimilar. The statute has in contemplation two points of time, one of which necessarily precedes the other. The first is the "time when the right of action shall first accrue," but delay in which is excused because of an existing disability; and the second, is the time of "the removal of the disability." At the first point of time the disability exists; at the second, it is removed. The disability must exist at the very point of time when the right of action first accrues, otherwise it is no excuse; and the removal of the disability necessarily occurs at a later date. Therefore, to say that the pendency of administration causes a disability in the heir to sue, and that on distribution the disability is removed, and *eo instanti* a cause of action first accrues, is to make the removal of the disability the source of the power to sue, instead of the excuse for apparent laches in not suing earlier. How can the heir be under a "disability to sue at the time the right of action shall first accrue," if the right of action does not accrue till the disability is removed?

The argument which seeks to make the pending administration one of the disabilities referred to in section 191 of the Probate Act, also makes it a disability under the general statute, and, as a result, heirs pending an administration can never be barred, and the statute of limitations never applies with any effect against the estate of a deceased person. It has been held in the cases cited to bar the executor or administrator. It likewise bars creditors, for they can only reach the property through the executor or administrator. We, therefore, find this curious condition, if plaintiff be correct—the executor or administrator may be barred, and cannot administer upon the property, or apply it to pay creditors; yet, after an indefinite length of time, a distribution, which is an act of administration, may be made, and the heir, or devisee, may recover for his own use, whilst creditors go unpaid. The executor or administrator, by distribution,

which is an act of administration, gives to the devisee, or heir, a cause of action which he himself did not possess.

The decision of the Supreme Court of California that Secs. 190 and 191 of the Probate Act applies to sales absolutely void, gives force to all parts of those sections, and cases may occur in which each part will be brought into operation. Sales may be void for various reasons. A sale under an order of the Probate Court may be void because the whole administration may be void. There may be no jurisdiction of the estate, or power to appoint the administrator; yet he may ignorantly act as such, and sales under order of the Probate Court may be made. So, too, the administrator may be lawfully appointed, and yet the proceedings on which the sale is ordered may lack jurisdictional requisites, and therefore be void. In each case, however, the purchaser at the probate sale is acting under an order of a Court. He naturally relies on it. There is much reverence attached to a judicial sale. Under the general statute of limitations, the simple trespasser without right or even color of right—the unqualified usurper—gains title by an adverse holding of five years. But the statute provides that he who buys under the sanction of a Court, and under the color of right thereby given, shall only be required to occupy three years.

Sec. 191 of the Probate Act says: "The preceding section shall not apply to minors or others laboring under disability," etc. Now, if the whole administration be void—say for want of jurisdiction to appoint an administrator—and the Court orders a sale, which is consequently void, the heir alone has the right of action when the purchaser enters upon the property. If that heir be a minor, he is under a disability, and therefore is excused from bringing the action for three years after attaining majority. He cannot be barred when the administrator is barred, for in the case supposed there is no lawful administrator. But if there be a lawful administrator, and purchasers under a void order of Court enter, the cause of action accrues to the administrator. He alone is entitled to possession, and the void sale confers no right and is no defense.

But such administrator must sue within three years from the time his cause of action first accrues, or he will be barred, and when he is barred, the heirs whom he represents are likewise barred.

VI.

The plaintiff here claims title under conveyances from the heirs, upon which he obtained distribution in the Probate Court. (Fols. 235 *et seq.*, Record.)

The petition for distribution shows a want of jurisdiction in the Court to make distribution. It shows that a litigation had occurred in which final judgment had been entered against the administrators, and in which it was held that the title was in defendants. The administrators were also out of possession. (Fols. 236–237, Record.) Yet the plaintiff in error, through the order of distribution, claims a right of action, which in the administrator was barred. In other words, the Probate Court allowed the administrator to administer upon property which had already been adjudged not to belong to the estate. The proposition is now made that though the administrator is barred of his action, yet by an act of administration he can confer a new right of action upon the heir or the grantee of the heir.

VII.

The estate of Harlan, deceased, has been prolific of litigation in California, and affords some of the leading cases in ejectment, and relating to the estates of deceased persons.

In *Haynes* vs. *Meek*, 10 Cal., 116, it was held that the resignation of the administrator, Smith, was valid inasmuch as the acceptance of it by the Probate Court was at most a mere error, not to be questioned collaterally.

In *Haynes* vs. *Meek*, 20 Cal., 288, it was held that the sale under order of the Probate Court was void for want of jurisdictional averments on the face of the petition.

In *Meeks* vs. *Hahn*, 20 Cal., 620, it was held that the heir or his grantee could not bring suit to recover real property until after distribution; that the right of action was exclusively in the administrator.

In *Harlan* vs. *Peck*, 33 Cal. 520, it was held that section 190 of the Probate Act embraces sales that are absolutely void as well as those that are voidable, and that the bar was good against the administrator. This was re-affirmed on petition for re-hearing at the Jan. Term, 1868. (See certificate of Clerk filed herewith).

In *Harlan* vs. *Miller*, the doctrine of *Harlan* vs. *Peck* (33 Cal. 520), was again affirmed. (See *Meeks* vs. *Vassault*, 3 Sawyer 211, and 34 Cal. 702—Index of cases.)

In *Meeks* vs. *Kerby*, 47 Cal. 169, it was again held that "the right to the possession of the real property of an estate remains exclusive with the administrator until the estate is settled, or distribution is directed under the order of the Probate Court, and until then neither the heirs nor their grantees can maintain ejectment for any portion of such property."

It is respectfully submitted that the judgment of the Circuit Court should be affirmed, both upon the general statute of limitations and the special statute relating to sales under the order of the Probate Court. The plaintiff in error has not, in compliance with rule 8 of this Court (amended 28th April, 1873), sent up with the transcript the opinion of Hon. Circuit Judge, and attention is respectfully called to it as reported in 3 Sawyer, C. C. R. 206, under the name of *Meeks* vs. *Vassault, et al.*

Jan., 1880.

S. M. WILSON,

Of Counsel for Defendants in error.

Supreme Court of the United States.

OCTOBER TERM, 1879.

No. 70.

WILLIAM NEWTON MEEKS, PLAINTIFF IN ERROR,

vs.

ROBERT OLPHERTS AND OTHERS, DEFENDANTS.

REPLY OF MONTGOMERY BLAIR, OF COUNSEL FOR PLAINTIFF IN ERROR, TO THE BRIEF OF DEFENDANTS.

The grounds taken by the defendants in error all resolve themselves into this, that the title of the heirs was vested in the administrator prior to distribution, and that the statute operated against the title, whilst so held, with the same effect as if held by the heirs.

The argument for this position is that the statute vests in the administrator the right of possession, and authorizes "an executor or administrator, or trustee of an express trust to sue without joining with him the person for whose benefit the action is prosecuted." The counsel also quotes, p. 10 of his Brief, from Beckett *vs.* Selover, 7 Cal., 239, the words, that "in all suits for the benefit of the estate, he (the administrator) represents both the creditors and the heirs;" but the Counsel does not quote what the court adds, viz, "that in proceeding to sell property, he (the administrator) is not the sole representative of the estate, BUT IS THE MOVING

PARTY IN BEHALF OF THE CREDITORS," and is therefore the adversary of the heirs. And in Meeks *vs.* Hahn, 20 Col., p. 626, where the same effort was made to distinguish the condition of the title to realty in California from that in the other States, because the statute there vested the right of possession in the administrator, the court says, "too much importance is given to that circumstance."

The court says, in Chapman *vs.* Hollister, 42 Cal., 463, that the "title to real estate passes to the heir or devisee, subject to the right of possession of the administrator for payment of debts," so that the only effect of the provision to give the creditors a lien on the property.

The administrator being, when proceedings are to be taken for its sale, "the moving party for the creditors," or the actor against the heir, the heir is required by the statute to be cited by him as any other defendant would be to defend his property against a hostile proceeding.

This case aptly illustrates the truth of this proposition and the injustice and oppression to which any other construction of the law inevitably leads. Aspinwall, the administrator, was himself the creditor, and sought to seize the real estate of the heirs. His predecessor had ample funds in his hands to pay his debt, but instead of compeling him or his sureties to pay the debt, he got an order from the probate court in Santa Clara county for the sale of land in San Francisco, which the heirs had previously sold to the plaintiff in error, and of which he was in possession, without giving him any notice whatever of the proceeding. And Aspinwall continued to retain the administration until 1864, and by so doing it is now contended succeeded in divesting the plaintiff of his title, although it is now admitted that the sale by Aspinwall was absolutely void.

The cases made part of the finding of the Court show that the plaintiff has not slept upon his rights. Aspinwall,

his adversary, being administrator, he could not assert his rights through him; hence after his tenants were ejected under the Aspinwall title, he brought suit himself to test that title, and was defeated by the pendency of administration. Aspinwall having resigned at the end of eight years, plaintiff got friendly administrators appointed who brought suit for him, and renewed the suit himself when it was decided that the administrators were barred. There has been, therefore, not a moment since the sale by Aspinwall was brought to his notice, when the title under that sale has not been contested by the plaintiff in error in every mode open to him.

It would be a remarkable state of the law if it should be held that the man who initiated this long struggle against the plaintiff, was nevertheless, in contemplation of law, his representative at the time and for eight years afterwards, and that his failure to sue himself during that time barred the plaintiff.

It is inconsistent alike with the settled rules of construction of statutes of limitation generally, and with the words of the particular statute under consideration, as shown in the Brief heretofore filed that a right of action should be barred before it accrued to the party asserting it. That the administrator, "the moving party for the creditors," and the agent by whom they procured the order of the court for the sale of the property, to divest the heirs of their title, was yet the representative of the heirs in regard to the property thus sold by the party acting against them, is not only inconsistent with the object of the act but is in direct conflict with its words.

Thus it is not only the manifest intention of the act to enable the heir or devisee to contest the title given by the administrator on such sales, but the act expressly gives the heir by name, and as heir, this right, and plainly intends that he shall have three years within which, as heir, to contest the validity of the sale made by the administra-

tor. It does not satisfy this intent or the express words of the law to say that, as the administrator, might have sued to recover the land against his own deed, in virtue of his right as administrator to the possession, the time which he suffered to elapse after the sale without doing so shall be counted against and preclude the heir from recovering in virtue of his title to the inheritance.

The law could not contemplate that the administrator would assail his own act, and, in reserving the short time of three years for the heir to question its validity, could not confound the administrator with the heir, or impute the laches of the administrator to the heir. It contemplated the assertion by the heir himself, of his right as heir against the act of the administrator in selling his property, and it is utterly inconsistent with this express intent to deprive him of that right, or of any part of the three years intended to be given him to assert it, because the administrator necessarily held on to the estate after the sale.

Nor would the saving of the rights of minors and other persons under disability to sue have been provided for by the 191st section if the construction of 190th section contended for by defendants was correct. The cases cited by the counsel and by the circuit court show that if it had been intended that the heirs should be represented by the administrator, he would have represented minors and others under disability to sue, equally with those capable of suing. And these two sections read together and by the light of the decisions of the supreme court of California show that the limitation against the heir ran only from the accrual to him of the right of action. They would conflict with the Constitution upon any other construction, because, by denying him the protection of the law, or the means of asserting his right against a disseisor, in which property consists, they would deprive him of it without due process of law.

MONTGOMERY BLAIR.

January, 1880.

WILLIAM N. MEEKS

vs.

FERDINAND VASSAULT ET AL.

In the Circuit Court of the United States for the District of California.

OPINION OF THE COURT.

Copied from pp. 211 to 218, 3d, 2d Sawyer Reports.

After stating the case the court says:

The probate proceedings down to, and including the administration of Aspinwall, are the same in question in the Supreme Court of California in Haynes *vs.* Meeks, 20 Cal., 288, and the facts relating thereto are fully set out in the report of that case. These proceedings were also, to some extent, considered by the Supreme Court of California in Haynes *vs.* Meeks, 10 Cal., 110; Meeks *vs.* Hahn, 20 Cal., 621; and Harlan *vs.* Peck, 33 Cal., 515. The sale by Aspinwall having been adjudged void in Haynes *vs.* Meeks, by the highest court in the State, plaintiff claims a right to recover. But the defendants set up and rely on the special statute of limitations found in the probate act relating to administrators' sales. Section 190 of that act is as follows: "No action for the recovery of any estate sold by an executor or administrator, under the provisions of this chapter, shall be maintained by any heir or other person claiming under the deceased testator or intestate unless it be commenced within three years next after the sale." If this section is applicable to a void sale, like the one in

question, then the action was long since barred, unless there is some other provision of the statute, or rule of law, that preserves the right of action in the plaintiff upon the facts of this case. That the statute is applicable to the sale in question, has been settled, and I think correctly, by the Supreme Court of California, in cases arising upon a sale of a portion of this very estate. (Harlan *vs.* Peck, 33 Cal., 520; and Harlan *vs.* Miller, January term, 1868, affirming it.) This being the construction of a statute of California by the highest court of a State, it is conclusive in this court. (Walker *vs.* the State Harbor Commissioners, 17 Wall., 648; Williams *vs.* Kirtland, 13 Wall., 311; Tioga R. R. *vs.* Blossburg and Corning R. R., 20 Wall., 137.) The statute would be useless if it did not apply to a void sale. A purchaser at a valid sale would not need the protection of the statute.

Under the statutes of California, real estate, like personalty, is assets in the hands of the administrator, and is to be administered, and applied first to the payment of the expenses of administration and debts of the deceased, and then the residue after satisfying all lawful claims distributed to the heirs. Realty and personalty stand upon the same footing, except that the personalty must be first exhausted before the real estate can be sold and applied to payment of the debts of the deceased. The right of possession, and right of action to recover possession of the real estate, vests exclusively in the administrator. The heirs cannot maintain an action to recover the real estate pending the administration, or after administration has been commenced, until the estate has been settled, or the real estate has been distributed to them by the probate court. This is also settled by numerous decisions of the supreme court of this State. (Meeks *vs.* Hahn, 20 Cal., 621; Meeks *vs.* Kirby, 47 Cal., 168; Chapman *vs.* Hollister, 42 Cal., 462; Burton *vs.* Lies, 21 Cal., 91.) This being so, it is insisted by plaintiff's counsel, that since neither he nor his grantors, the heirs of

Harlan, could maintain an action for the recovery of the lands in controversy pending the administration, or until distributed by the probate court on November 6, 1869, they were under a legal disability to sue, within the meaning of section 191 of the probate act; and the action having been brought within three years after the said distribution, that it is not barred. Section 191 is as follows: "The preceding section shall not apply to minors or others under any other legal disability to sue at the time when the right of action shall first accrue; but all such persons may commence such action at any time within three years after the removal of the disability." The question is, what is the meaning of the phrase, "any legal disability to sue," as here used? This provision does not define the term "legal disability." It assumes that there are other disabilities known to the law, and we must go to the law as it existed outside of this section to ascertain what they are. The provision mentions "minors," and adds, "or others under any *legal* disability."

Upon turning to the general statute of limitations we find specified as disabilities, infancy, insanity, imprisonment for criminal offenses, coverture, etc., but neither in that nor in any other statute is anything of the kind now claimed as a disability, named or recognized as such. The definition of "disability," as given by Bouvier, is, "The want of legal capacity to do a thing." (Bouv. Law Dictionary.) The disability may relate to the power to contract, or to bring suits; and may arise out of want of sufficient understanding, as idiocy, lunacy, infancy; or, want of freedom of will, as in the case of married women, and persons under duress: or, out of the policy of the law, as alienage when the alien is an enemy, outlawry, attainder, *praemunire*, and the like. The disability is something pertaining to the person of the party—a personal incapacity—and not to the cause of action or his relation to it. There must be a present right of action in the person, but some want of capacity to sue. In this

case there was no want of power or capacity in the person. The difficulty is in his relation to the subject-matter of the suit. There was no present right of action in the heir, or his vendee. He had not yet succeeded to the right of action. The cause of action had accrued, but it was in the administrator, and had not yet passed to the heir. There was, however, a party in existence competent to sue—one to whom the law gives the right, and upon whom it imposes the duty to sue. This party is the administrator who is the trustee of the estate, and who for this purpose represents both the heirs and the creditors of the estate. He represents the title. If the administrator sues, or is sued, and fails when the title is in issue and determined, the judgment is binding both upon the heirs and creditors of the estate. The matters thus adjudged would afterwards be *res adjudicata* between the opposing party in the action and the heirs, as well as the administrator. This has, also, been settled by the supreme court of the State. (Cunningham *vs.* Ashley, 45 Cal., 485.) This could not be so unless the administrator represented the heirs. The disability mentioned is undoubtedly one of the disabilities already existing recognized by the statute, such as those mentioned in the statute of limitations affecting the capacity to sue of a person having a present right of action existing in himself, and which excuses him from bringing the action. It cannot mean the want of a present cause of action. If there is no present right of action in a party, he has no occasion for a present capacity, an ability, to sue, or, for an excuse for not suing. The administrator being invested with the right of action to recover land of the estate, if he neglects to sue too long the action is barred, and as he represents the creditors and heirs for this purpose, it has often been decided that when an action is barred as to him, it is barred as to the heir, even though the heir be at the time a minor, or resting under some other disability. (Darnell *vs.* Adams, 13 B. Mon. 278–9; Couch's Heirs *vs.* Couch's Administrators, 9 Id. 161–2; Rosson *vs.* Ander-

son, Id. 425; Williams *vs.* Otey, 8 Humph. 569; Woodbridge *vs.* Planter's Bank, 1 Sneed. 297; Worthy *vs.* Johnson, 10 Geo. 358; Long *vs.* Cason, 3 Rich. Eq. 60; Wych *vs.* East India Co., 3 P. Will. 309; Pentland *vs.* Stokes, 2 Ball & B. 74; Smilie *vs.* Biffle, 2 Barr. 52.) Several of these are cases of administrators, and others of other trustees, where the *cestui que trust* was held to be barred when the trustee was barred. It is difficult to see how upon the principle it should be otherwise. The moment an adverse possession by a wrong doer, of lands belonging to an estate in course of administration commences, a cause of action arises to recover it; but the policy of law vests it exclusively in the administrator, and there it remains until the lands are lawfully sold and conveyed for the purpose of administration, or are distributed to the heir. In the former case the right of action passes to the purchaser; in the latter to the heir. It is the same cause of action, and it exists in but one party at the same time. If the cause of action is barred before the sale and the conveyance to the purchaser, or the distribution to the heir, there is none left to pass to either, and neither ever acquires any valid cause of action at all. It the authorities cited are not all wrong, the difficulty with the plaintiff is, not that he was laboring under a disability to sue upon an existing cause of action in his favor, but that he never became vested with a living cause of action. The cause of action became barred, and the title vested in the adverse possessor under the special statute of limitations before it came to him. Statutes of limitations are now regarded as statutes of repose, and not mere penalties for neglect, and are intended for the benefit of those who have purchased and occupied lands in good faith, believing they acquired a good title; and the policy of the law seems to have been, to shorten the time within which rights acquired in good faith under the sanction of judicial proceedings in probate courts can be disturbed. Whether as effective as desirable or not, the

heirs are not without a remedy. They have a remedy against the administrator and upon the administrators' bond; and they may, in a proper proceeding, also compel the administrator to sue. (Smilie *vs.* Biffle, 2 Bar. 52–4; Tyler *vs.* Houghton, 25 Cal. 29.) Besides, it is not apparent in this case why the partial distribution could not have been made as well within three years, as more than thirteen years after the sale, and thus have enabled the distributees to sue. There must have been gross negligence on the part of the heirs in not compelling the several administrators to account, and in not applying for a distribution. Ample funds appear to have come to the hands of the administrator to pay all claims against the estate as early as 1855. If the heirs are not bound when the bar has attached as against the administrator, the administration, by the non-action of the heirs, might have been kept open indefinitely, and the right of action prolonged for a century at their option.

The defendants entered under their conveyances in 1856. If, as claimed by plaintiff, the whole proceedings were void, a right of action accrued in favor of the administrator to recover possession immediately; and it was barred as to him at the end of three years, or in February, 1859. The partial distribution to plaintiff was not made till November, 1869, more than ten years after the bar of the statute attached as against the administrator. If the cause of action is not barred as to the heirs and the plaintiff, their successor in interest, then, we have this curious condition of things.

For upwards of ten years the defendants were wrongfully in possession of the land, and yet there was no right of action in favor of anybody to recover. The administrator could not recover because he was barred. The heirs could not recover because the law vested the right of action exclusively in the administrator. The heirs would at length acquire the land, while it would cease to be assets of the estate, and the creditors be cut off. Why should the creditors, who, under the statute, have the first lien upon the

estate, be barred, by the neglect of the administrator, while the heirs, whose interest is subordinate, are not? The language of the statute is express, that "no action shall be maintained by *any heir or other person* claiming under the deceased testator or intestate, unless it be commenced within three years *next after the sale*." The heir is named in terms.

The plaintiff's counsel insists that under our statute the heir occupies a position similar to a remainderman; that the remainderman is not barred by the neglect of the holder of the preceding estate to sue until his right is lost, and that for similar reasons, the heir is not barred by the failure of the administrator to sue. The decisions relating to remaindermen seem to depend upon the particular language of the various statutes under which they arose, and to vary with the language. But whatever the rule may be with respect to remaindermen, I do not think their position is like that of the heir under our statute. The owner of the particular estate and the remaindermen do not represent the same estate. There is no connection whatever between them except that one estate begins where the other shall end. The intermediate owner is in no respect the trustee or representative of the remainderman. But the administrator is a trustee of the heir and the creditor. He represents the heir and the creditor in the administration. As we have seen, a judgment in a suit to which the administrator is a party, and in which the title to the estate is determined, binds the heirs. This must be because he represent the heir. I put the decision upon the statute, and upon this principle as sustained by the authorities. The same statute which vests the right to the exclusive possession of the real estate, and the exclusive right of action to recover it from a disseisor pending administration, and which confers the power to sell and convey title to the real estate under the authority and direction of the probate court, also prescribes the time within which an action must

be brought by the heir or any other party claiming under the deceased, to recover the land from a purchaser in possession under a sale improperly made. It also prescribes the exceptions to the general rule laid down, and the court is not authorized, upon the idea that other cases are within the equity though not within the letter of the statute, to interpolate other exceptions than those expressed in the statute itself. (McIver *vs.* Ragan, 2 Wheat., 28; Tynan *vs.* Walker, 35 Cal., 643.)

Sections 258 and 259, providing for a final distribution to the parties entitled, and providing that each party to whom a specific portion is allotted, "shall have the right to demand and recover their respective shares *from the executor, administrator, or any person having the same in possession,*" in no respect limits the provisions of section 190, as claimed by plaintiff. These sections only apply to property belonging to the estate at the time of distribution. Of course, there can be no title created by the act of distribution. Nothing can be given to the distributee but that which remains in possession or custody of the administrator, as a portion of the estate. Property lawfully sold by the administrator and conveyed by valid conveyance, ceases to be a portion of the estate; and the fact that the court should assume to distribute such property to the heir would not revest a title in the distributee. The adverse possession for the time prescribed vests a perfect title in the possessor as against the former holder of the title and the world. Arrington *vs.* Liscom, 34 Cal. 380–7; Cannon *vs.* Stockman, 36 Cal. 541; Lamb *vs.* Davenport, 1 Saw. 621; Winthrop *vs.* Benson, 31 Maine, 384; Leffingwell *vs.* Warren, 2 Black, 605, and cases therein cited.

Suppose an action upon a promissory note or other demand or to recover a piece of personal property belonging to the estate had become barred upon the general statute of limitations by neglect of the administrators to sue, would it be claimed that a subsequent distribution of the dead

cause of action to the heir, would give it new life and enable him to recover on it? I think no such claim would be made. Yet sections 258 and 259 would as clearly apply to such cause of action as to real estate, the title to which has been vested in an adverse possessor under the section in question.

I see no way of escape from the conclusion that plaintiff's action is barred under section 190 of the probate act.

There must be a judgment for defendants with costs, and it is so ordered.